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In the Supreme Court of the United States

OCTOBER TERM, 1907

No. 21

In the Matter of the Estate of
PAULINE SCHMIDT, Deceased

OSWALD SCHMIDT, MINNA FABEL, OLGA BERTA WINKLER,
ALFRED ROESTER, JOHANNA BLASCHKE and HANS FURBER,
Appellants

vs.
WILLIAM S. MILLER, Administrator of the Estate of Pauline Schmidt,
Deceased, MARK O. HAYFIELD, TOM MCCALL, and ROBERT W.
STRAUS, respectively the Governor, Secretary of State and State
Treasurer of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons concerned or interested, having or claiming
any interest in the Estate of Pauline Schmidt, Deceased.
Appellees

APPEAL FROM THE SUPREME COURT OF THE
STATE OF OREGON

BRIEF OF APPELLER
STATE LAND BOARD OF OREGON

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Appellees.

**APPEAL FROM THE SUPREME COURT OF THE
STATE OF OREGON**

**BRIEF OF APPELLEE
STATE LAND BOARD OF OREGON**

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (R. 14-34) is reported at 243 Or. 567, 412 P.2d 781, rehearing denied, 243 Or. 592, 415 P.2d 15 (R. 35-36).

The opinion, findings and order of the Circuit Court of Multnomah County, Oregon, Probate Department, (R. 9-13) were not reported.

JURISDICTION

The opinion (R. 14-34) and order (R. 34-35) of the Supreme Court of Oregon were issued March 23, 1966, and the petition for rehearing (R. 35-36) was denied June 3, 1966. Notice of appeal to this Court was filed August 31, 1966 (R. 37-39). Probable jurisdiction of this Court was noted May 8, 1967 (R. 40). Appellants invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. Does Section 111.070 of Oregon Revised Statutes unconstitutionally interfere with the foreign relations power of the federal government by requiring East German heirs of an Oregon decedent to establish the conditions of their eligibility to take in the absence of an applicable treaty or other overriding federal policy?

2. Was the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany essentially abrogated by Article XXVIII of the 1954 Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany?

STATUTE, CONSTITUTION AND TREATY PROVISIONS INVOLVED

The relevant provisions of Oregon Revised Statutes, Section 111.070; portions of the Constitution of the United States, from Article I, Sections 8 and 10 and the Fourteenth Amendment; portions of the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany; notes dated June 2, 1953,

between the Secretary of State of the United States and the Charge d'Affaires of the Federal Republic of Germany; portions of the Agreement dated June 3, 1953, concerning the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany; and a portion of the 1954 Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany are set forth in the Appendix, *infra*. pp. 24-31.

STATEMENT

This case concerns the disposition of the assets of the estate of Pauline Schrader, a widow, resident of Portland, Oregon, who died there intestate, on September 30, 1962.

The appellants, hereafter called heirs, are the decedent's sole heirs and are residents of the Soviet Zone of Germany (East Germany). The Appellee, State Land Board of Oregon, petitioned the probate department of the Circuit Court of Multnomah County, Oregon for the escheat of the net proceeds of the estate under the provisions of ORS 111.070 (R. 2-3).

Thereafter the heirs filed their petition to determine heirship to obtain distribution of the estate (R. 3-7). The answer of the State of Oregon essentially denied the allegations of the heirs (R. 7-8). The reply of the heirs (R. 9), alleged the invalidity of ORS 111.070 as an unconstitutional invasion of the power of the Federal Government to regulate foreign relations and as a violation of the policy of the Federal Government.

The circuit court ordered the escheat of the estate to the State of Oregon, having found that there were no treaties applicable to the case; that ORS 111.070 was not an unconstitutional invasion by the state of the power of the Federal Government to regulate foreign relations; and that the heirs had not established the reciprocity required by ORS 111.070 (R. 9-13).

On the appeal, the Supreme Court of Oregon modified the order of escheat (R. 33-34) by declaring the heirs to be eligible to inherit the real property of the decedent under the provisions of Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany (App., *infra*, p. 26), which the court found to be still in existence with respect to East Germany. The court found that the 1923 Treaty as applied to East Germany was not affected by Article XXVIII of the 1954 Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany (App., *infra*, pp. 30-31) (R. 20).

The Supreme Court of Oregon upheld the circuit court as to its decision regarding personal property in its application of ORS 111.070 (R.30). This decision was based wholly upon *Clark v. Allen*, 331 ~~US~~ 503. The Oregon Supreme Court held that the 1923 Treaty was not applicable to personal property, of an American citizen, situated in the United States when the proposed distributee is a German national (R. 29-30). The Oregon Supreme Court also found that ORS 111.070 was not an unconstitutional attempt to invade the Federal Government's power to regulate foreign relations, while recog-

nizing the supremacy of an overriding federal policy regarding the descent and distribution of property to nonresident aliens (R. 30-31).

SUMMARY OF ARGUMENT

It is the position of the State of Oregon that inasmuch as the devolution of decedents' property within a state is subject to statutory regulation by the states, the requirements of ORS 111.070 (App., *infra*, p. 24) for eligibility of nonresident alien heirs or distributees are not an unconstitutional attempt by the State of Oregon to interfere with the right of the Federal Government to regulate foreign relations.

The supremacy of federal treaties or other policy is recognized, but in the absence of any showing of direct and substantial effect of such statute upon foreign relations the right of states to regulate the succession to decedents' property should not be limited. Moreover, when as here the State Department denies that such statutes have affected foreign relations it appears that the policy of the government is to allow the states to continue to regulate such matters.

The "Act of State" doctrine is not applicable, even by analogy, to this case for it proscribes a state from examining the internal acts of a recognized sovereign foreign state regarding the validity of the acts. Here not only are there problems relating to recognition but of greater significance, the state is not examining the internal act of a sovereign foreign state concerning its validity but is only looking to the evidence of purported

heirs to determine if such heirs are eligible distributees. The validity of foreign acts does not enter the case.

The heirs also urge here that ORS 111.070 (App., *infra*, p. 24) is violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution (App., *infra*, p. 25). However, these issues have never been raised before or decided by any other court in this case and they are therefore not properly before this Court. In addition, the heirs as nonresident aliens do not come under the constitutional protections as they are outside the territorial jurisdiction of the United States.

The State of Oregon takes the position that a consideration of the 1923 Treaty and its application to East Germany must involve the events, negotiations and agreements leading to the 1954 Treaty and specifically Article XXVIII thereof (App., *infra*, pp. 30-31).

From this material it is a logical conclusion that the 1954 Treaty abrogated a large portion of the 1923 Treaty and limited the application of the remainder to the territory under the jurisdiction of the Federal Republic of Germany. Therefore the 1923 Treaty is not applicable to East Germany, especially Article IV of the 1923 Treaty, as it no longer exists.

ARGUMENT

1. The provisions and requirements of Section 111.070 of Oregon Revised Statutes are not an unconstitutional incursion of the state into the Federal Government's exclusive field of foreign affairs.

The relevant requirements of ORS 111.070, (App., *infra*, p. 24) briefly stated, are three; (1)(a) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (1)(b) that United States citizens be able to receive payment in the United States of funds from estates in the foreign country; and (1)(c) that the nonresident alien beneficiary of an Oregon estate be able to receive the assets of the estate without confiscation.

The State of Oregon contends that the requirements of ORS 111.070 are proper regulation of the devolution or succession of the property within the state of a decedent domiciliary under the powers reserved to the states by the Tenth Amendment of the United States Constitution.

As this Court has consistently held from the case of *Mager v. Grima* (U.S.) 8 How. 490, 493-494, in 1850, through the cases of *Lyeth v. Hoey*, 305 U.S. 188, 193; *Irving Trust Co. v. Day*, 314 U.S. 556, 562; and *Clark v. Allen*, 331 U.S. 503, 517, to the case of *United States v. Burnison*, 339 U.S. 87, 91-93, in 1949, the rights, requirements, conditions and limitations upon the succession to property are determined by the law of the state within the limits of which the property is situated.

The Court in *United States v. Burnison*, 339 U.S. 87, 91, restated its holding in *United States v. Fox*, 94 U.S. 315, 321,

"* * * that the power to control devises of property was in the State, and that therefore a person

must 'devise his lands in that State within the limitations of the statute or he cannot devise them at all.'"

The Court in *Burnison*, supra, (339 U.S. at 91), approached the problem there, whether the state statute could preclude a devise to the United States, in a manner that appears applicable to the present case.

"* * * This argument (that the state cannot interfere with the right of the U.S. to receive) fails to recognize that the state acts upon the power of its domiciliary to give and not on the United States power to receive. * * *"

The Court further underlined this position and reinforced it a few lines later in the *Burnison* case, supra, (339 U.S. at 91-92), when it said,

"* * * The *Fox* case is only one of a long line of cases which have consistently held that part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries. * * *"

This is not to imply that the power of the states over succession to decedents' estates is absolute. The State of Oregon and the Oregon Supreme Court (R. 27-28) recognize that state statutes are subordinate to applicable contrary treaty provisions, or to "an overriding federal policy, as where a treaty makes different or conflicting arrangements." *Clark v. Allen*, 331 U.S. 503, 517, citing *Hauenstein v. Lynham*, 100 U.S. 483, and Cf. *Hines v. Davidowitz*, 312 U.S. 52.

However, the fact that state regulation of decedents' estates may effect the periphery of the federal right to

regulate foreign relations is no more an interference with this federal power than the fact that state action may affect certain areas of interstate commerce. See *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299, 318, 319.

If this Court decides to continue interpreting Article IV of the 1923 Treaty (App., *infra*, p. 26) as applicable to East Germany, but only as pertaining to real property, or if the Court determines that the 1923 Treaty has been terminated, as is hereafter submitted, and is not applicable to East Germany, then the question posed is, does any "overriding federal policy" exist before which the law of the State of Oregon must give way?

The heirs contend that the statute has a profound effect on foreign affairs and relations. However, there is no demonstration of such effect, other than the statements of the heirs with reference to the many cases cited that, "reflections by state courts * * * must inevitably embarrass the executive branch and have an adverse effect on the relations of the United States * * * cannot be denied and needs no demonstration." (Appellants' Br. p. 27) or "* * * no one could argue with any conviction that a case such as this does not seriously affect the foreign relations of the United States." (Appellants' Br. p. 34).

The State of Oregon denies the adverse effect of such laws on the foreign relations of the United States. We submit that such allegations do need demonstration and we feel the lack of serious affect can be argued.

We would not and do not contend that such laws may

not have some indirect effect on foreign affairs, as this court observed in *Clark v. Allen*, 331 U.S. 503, 517,

" * * * What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line."

To this point, the only statements known to the State of Oregon from any government relating to the effect of the statute in question, ORS 111.070 on foreign relations or affairs is the statement of the Federal Government through the Solicitor General in his Memorandum Brief, p. 5, filed herein upon the Order of the Court, wherein it was stated,

" * * * The Department of State has advised us, however, that State reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country, * * * Appellants' apprehension of a deterioration in international relations, unsubstantiated by experience, does not constitute the kind of 'changed conditions' which might call for a re-examination of *Clark v. Allen*."

With this position taken by the U. S. State Department it appears plain that the argument of the heirs is one of desperation rather than actuality."

While the laws of the State of Oregon must bow to an "overriding federal policy" if any federal policy can be said to exist in this area it must be interpreted to be that the Federal Government looks upon the establishment and interpretation of laws of succession or devolution of property of decedents as being specifically within the province of the several states unless specific provi-

sion is made therefore by international agreement or treaty.

2. The "Act of State" doctrine is not applicable to the case of state determination and regulation of succession to or devolution of the property of domiciliary decedents.

The "Act of State" doctrine as carried forward by the case of *Banco National De Cuba v. Sabbatino*, 376 U.S. 398 cannot be used as the basis for holding that the courts of the states may not examine the laws of foreign states relative to the inquiry of whether there is an eligible beneficiary to the estate of a domiciliary decedent.

The specific holding of the *Sabbatino* case at 376 U.S. 428, as stated by Mr. Justice Harlan, was,

"* * * we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."

There are at least two distinctions or requisites of the "Act of State" doctrine which preclude any application to the present case.

First, the doctrine only applies to a sovereign government recognized by the United States.

Recognition of the foreign government is a substantial element of the doctrine as evidenced by the distinction drawn in *Sabbatino* between nonrecognition and severance of relations with a recognized government.

Sabbatino, *supra*, 376 U.S. 410. There can be no question here that with the heirs as residents of East Germany, over which the recognized Government of the Federal Republic of Germany has no territorial jurisdiction, (Agreement of 1953, App. *infra*, pp. 28-29; Article XXVI 1954 Treaty, App. *infra*, p. 30), the requirement of recognition is a high hurdle.

Second, and more importantly, the "Act of State" doctrine only precludes the courts from examining the *validity* of the internal acts of a sovereign foreign power. Here the validity of the acts of the foreign sovereign is not in question. Under the reciprocal inheritance statutes the courts do not inquire into the validity of the foreign acts but only into their existence as it relates to the establishment of a claimant as an eligible heir of the domiciliary decedent under the laws of the state.

As stated earlier in our argument the regulation and requirements for the inheritance of property within a state from its domiciliary decedents is a matter of state law. *Mager v. Grima*, (U.S.) 8 How. 490; *Clark v. Allen*, 331 U.S. 503, and *United States v. Burnison*, 339 U.S. 87, and other cases previously cited.

Further, the "Act of State" doctrine is usually a matter for consideration in cases of an uncompensated taking or other similar act by a foreign power. We submit that the doctrine is not applicable to this case, even by analogy.

The heirs, presumably as a make-weight argument, (Appellants' Br. 64), seek to impute to the State of Oregon in its enactment of ORS 111.070 in 1951 (Oregon

Laws 1951, chapter 519) the intent expressed by the California legislature (Cal. Stat. 1941, ch. 895; Appellants' Br. 38-39) in the required emergency clause explanation for the California reciprocity statute.

The clause provided briefly that because of the effect of the war, property due California citizens or owned by them was impounded or confiscated by foreign nations, and such foreign nations constitute a threat to the United States Government and therefore it is necessary that property of United States decedents remain in the United States rather than being transmitted to foreign nations where it might be used in war against the United States.

Not only did the California District Court of Appeal, First District, deny that this statement was a valid exposition of legislative intent in *Bevilacqua's Estate*, (no official citation found), 161 P. 2d 589, 594 (1945), but the very language of the statement, relating, in 1941 to World War II is irrelevant in 1951, when ORS 111.070 was enacted.

3. The contention of the heirs that Section 111.070 of Oregon Revised Statutes is repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States is not properly before this court nor do the heirs as nonresident aliens have standing to avail themselves of this constitutional protection.

In this case as in *Clark v. Allen*, 331 U.S. 503, 516, "Issues under the Fourteenth Amendment are not raised * * *." The heirs seek to inject these issues into the

case for the first time in their presentation to this Court, without ever having raised the issue in the courts of Oregon.

In an "unbroken line of precedent" this Court has held that where the issue has not been presented to the state courts and has not in fact been decided by the highest court of the state, the question will not be entertained. *Beck v. Washington*, 369 U.S. 541; *Wolfe v. North Carolina*, 364 U.S. 177, 195; *John v. Paullin et al.*, 231 U.S. 583.

Even beyond this, assuming *arguendo* that the matter might be heard, the heirs have no standing to raise the issue.

The protections of the Constitution of the United States do not extend to aliens not within the territorial jurisdiction of the United States. As the Court stated in *Johnson v. Eisentrager*, 339 U.S. 763, 771.

"But in extending constitutional protections beyond the citizenry, the court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of *Yick Wo v Hopkins*, the Court said of the Fourteenth Amendment,

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; . . ."

For these reasons, the issue of whether ORS 111.070 contravenes the due process clause or equal protection clause of the Fourteenth Amendment to the Constitution of the United States is not before the Court.

4. A substantial part of the 1923 Treaty of Friend-

ship, Commerce and Consular Rights between the United States and Germany including Article IV has been expressly terminated.

(Note: This point of argument has been included in response to the position taken by the Solicitor General of the United States in his brief as amicus curiae, on file herein. The Solicitor General advocates the re-interpretation of the 1923 Treaty to hold that Article IV thereof applies to the dévolution of personal property as well as real property in the United States to heirs in East Germany. The State of Oregon submits that in a re-evaluation of the 1923 Treaty there are facts sufficient, which have occurred since the decision of *Clark v. Allen*, 331 U.S. 503, upon which to decide that Article I through XVI of the 1923 Treaty have been terminated, and that by express limitation of the remaining provisions they are only applicable to the territorial jurisdiction of the Federal Republic of Germany.)

The State of Oregon takes the position that the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, December 8, 1923, 44 Stat. 2132, T.S. No. 725 (effective October 14, 1925) amended June 3, 1935, 49 Stat. 3258, T.S. No. 897, hereinafter called the 1923 Treaty, has been substantially terminated or abrogated by the Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, October 29, 1954, 7 U.S.T. & O.I.A. 1839, TIAS No. 3593 (effective July 14, 1956) hereafter called the 1954 Treaty.

The Supreme Court of Oregon in considering this

case concluded that due to the limitation of the 1954 Treaty to the territory under the sovereignty of the Federal Republic of Germany the language of Article XXVIII of the 1954 Treaty did not apply to the 1923 Treaty as a whole (R. 20).

Article XXXI of the 1923 Treaty (App., *infra*, p. 27) provides for the modification or termination of the Treaty after the initial ten year period of the Treaty, one year after notification by either party of the intention to modify or terminate the Treaty. The events deemed relevant to this issue are set forth below.

Article VII of the 1923 Treaty was amended by Agreement between the United States of America and Germany dated June 3, 1935, 49 Stat. 3258, T.S. No. 897, whereby the second, third, fourth, sixth and seventh paragraphs of Article VII were abrogated. This act was between the original treaty parties.

Eighteen years later the 1923 Treaty as amended was modified by an exchange of notes dated June 2, 1953 between the Secretary of State of the United States and the Charge d'Affaires of the Federal Republic of Germany, 5 U.S.T. & O.I.A. 827, TIAS No. 2972. (App., *infra*, pp. 27-28); hereafter called the notes of June 2, 1953. The modification consisted of the termination of Article VI of the Treaty of 1923 under the provisions of Article XXXI thereof. (App., *infra*, p. 27)

The next day, June 3, 1953, an Agreement between the United States of America and the Federal Republic of Germany, 5 U.S.T. & O.I.A. 1939, TIAS No. 3062 was signed concerning the application of the 1923 Treaty,

hereafter called the Agreement of 1953. The relevant portions of this June 3, 1953 agreement for our purposes are the preamble of the agreement, Article IV and Article V (App., *infra*, pp. 28-29).

Briefly, the preamble (App., *infra*, p. 28) states the intent of the parties is the restoration of the 1923 Treaty to full force and effect except as provided, as a provisional measure pending conclusion of a new treaty.

Article IV (App., *infra*, p. 29) provides in essence that until Germany is unified the 1923 Treaty shall be applied to all of the territory over which the Federal Republic of Germany exercises jurisdiction. Further, the 1923 Treaty should also be applied to West Berlin when the necessary legal procedures had been accomplished.

Article V (App., *infra*, p. 29) agrees that negotiations for a new treaty shall begin immediately.

Finally, the 1954 Treaty was negotiated. Article XXVIII (App., *infra*, pp. 30-31) of the 1954 Treaty expressly terminates Articles I through V, VII through XVI, and XXIX through XXXII of the 1923 Treaty. Thus, considering Article VI already having been terminated by the notes of June 2, 1953, (App., *infra*, pp. 27-28), only Articles XVII through XXVIII remain in force until replaced by a consular convention between the Treaty parties.

The conclusion to be drawn from the negotiations and agreements set forth is that from the time of the notes of June 2, 1953 modifying the 1923 Treaty, the United States dealt with the Federal Republic of Germany as the Treaty Party under the 1923 Treaty. Thus when the

Treaty was restored to full force but limited by the Treaty parties to the territorial jurisdiction of the Federal Republic of Germany this was the limit of the existence of the Treaty. Then by Article XXVIII of the 1954 Treaty the Treaty Parties terminated Articles I through XVI of the 1923 Treaty. The logical result of this action by the Parties is that these Articles no longer exist for any purpose, having been expressly abrogated by the parties. The portion remaining in existence, Articles XVII through XXVIII, are limited in application to the Federal Republic of Germany.

Further evidence of the attitude of the United States toward the status of the Federal Republic of Germany is available from statements issued by the governments of both the United States of America and the Federal Republic of Germany, as compiled in I Whiteman, Digest of International Law 332-338 (1963). At page 332 the editor states,

"In consideration of the question whether the Government of the Federal Republic may be regarded as the successor of the German Reich, the Office of the Legal Advisor prepared a memorandum in 1950 which, in discussing first the issue of Germany's continued existence as a State, reads in part as follows:

"Since limited sovereignty is no bar to the existence of a State, we may proceed to examine the case of Germany in the light of the usual requisites of statehood. * * * The requisites for a State were present and never ceased to exist.

* * *

"... The Government of the Federal Republic may be considered as the Government of Germany.

* * *

"The position of the Three Powers is that the government of the Federal Republic is the one and only legitimate government qualified to speak for the German people. The existence of the eastern German government is not recognized as legitimate. Therefore, the situation is as if it did not exist. . . ."

"The Office of the Legal Advisor (Raymond), memorandum, 'Memorandum on the Successorship of the Government of the Federal Republic to the Reich', July 13, 1950, MS. Department of State, file 762.00/7-1350."

Thus, it is apparent that in 1950 the United States State Department considered that the Federal Republic of Germany spoke as the Government of Germany.

The advent of the Soviet Government's position that East Germany had become a sovereign state was the occasion for additional statements which are of interest. These are set forth in 1 Whiteman, Digest of International Law 337-338 (1963), as follows:

"In response to the Soviet Government's announcement of March 25, 1954, that East Germany had become a sovereign state, the United States, British, and French High Commissioners issued a joint declaration April 8, 1954, which read:

* * *

"The three governments represented in the Allied High Commission will continue to regard the Soviet Union as the responsible power for the Soviet Zone of Germany. These governments do not recognize the sovereignty of the East German regime which is not based on free elections, and do not intend to deal with it as a government. . . ."

"XXX Bulletin, Department of State, No. 773, Apr. 19, 1954, p. 588; II American Foreign Policy, 1950-1955: Basic Documents (1957) 1756-1757.

"Adverting to the Soviet Union Government's

announcement of March 25, 1954, regarding the establishment of the same relations with the so-called German Democratic Republic as with other sovereign states, the Government of the German Federal Republic declared in a statement of April 7, 1954:

"By this declaration the Soviet Government seeks to create the impression that the part of Germany occupied by it has become an independent state with status equal to that of other sovereign states.

"The Soviet declaration cannot, however, alter in any way the fact that there is, was, and will be only one German state, and that it is solely the governmental organs of the Federal Republic of Germany which today represents this German state which has never perished. Nor is this fact altered by the painful reality which is that German sovereignty cannot at present be exercised uniformly in all parts of Germany."

"II Bundestag Stenografische Berichte (1954) 794."

The limitation of the territorial sovereignty of the Federal Republic of Germany either by the Agreement of 1953 or the 1954 Treaty does not operate to preclude the United States from terminating the 1923 Treaty or any portion of it for such action may be accomplished, under the terms of the Treaty, Article XXXI (App., infra, p. 27) by unilateral notice by either of the parties.

The Supreme Court of Oregon came to the conclusion that the 1923 Treaty was in existence and applicable to East Germany (R. 27). We would submit that this conclusion should be re-examined, not upon the basis of the possible abrogation of the 1923 Treaty by virtue of World War II or the ability of compliance or enforcement of the treaty obligations, although the latter matters

certainly raise questions, but we question the conclusion based upon the acts of the Treaty Parties as set out above.

The Supreme Court of Oregon relied to some extent upon two statements of the State Department of the United States to the effect that the provisions in Article XXVIII of the 1954 Treaty (App., supra, pp. 30-31) terminating the majority of the 1923 Treaty did not effect the termination of the 1923 Treaty as applied to East Germany.

The first of the two statements (R. 20) is found in a letter dated February 24, 1964, from Ely Maurer, Assistant Legal Adviser for European affairs, to Attorney General of Oregon Robert Y. Thornton, it stated,

"* * * Since the Federal Republic of Germany was the Party to the 1954 Treaty the provisions of that Treaty apply solely with regard to the area of the Federal (fol.20) Republic of Germany. Consequently, the 1954 Treaty does not apply with respect to that part of Germany outside the Federal Republic of Germany commonly referred to as East Germany, and Article XXVIII of the 1954 Treaty does not apply with regard to East Germany. As far as East Germany is concerned, Article IV of the 1923 Treaty has not been replaced through the operation of Article XXVIII of the 1954 Treaty."

The second statement (R.24-25) appears in a document published by the Treaty Affairs Staff, Office of the Legal Adviser, United States State Department dated September 30, 1965, "Treaty Provisions Relating to the Rights of Inheritance and Acquisition and Ownership of Property in Force between the United States and Other Countries", at page 19-20, Note 3, and states in part,

"* * * It appears that Article IV of the treaty

of friendship, commerce, and consular rights between the United States and Germany signed on December 8, 1923 (44 Stat. 2132), which contains provisions relating to rights of inheritance of and succession to property, continues in force with respect to areas of Germany not presently included in the territory of the Federal Republic and Land Berlin. The entry into force of the 1954 treaty between the United States and the Federal Republic, which replaced and terminated Article IV of the 1923 treaty with respect to the area of Germany constituting the Federal Republic and Land Berlin, had no effect on the 1923 Treaty with respect to the area of Germany not included in the Federal Republic and Land Berlin. The United States considers that the Soviet Union remains responsible for the Soviet Zone of Germany. The Soviet Union has purported to turn control of the Soviet Zone over to the so-called German Democratic Republic and has denied further responsibility for governmental activities in that area. The United States does not recognize the Soviet Zone as a separate State and does not recognize the present regime there as a government. The United States considers that the Government of the Federal Republic of Germany is the only government entitled to speak on behalf of the German people."

While these statements are entitled to and were given weight by the Oregon Supreme Court (R. 25) and their value is acknowledged by the State of Oregon they are not solely determinative. Nor is this Court bound by the interpretation of the treaty provisions by the governmental departments charged with their negotiation and enforcement. *Kolovrat v. Oregon*, 366 U.S. 187, 194.

For these reasons the State of Oregon submits that an examination of the modification of the 1923 Treaty and the background and environment of the 1954 Treaty

leads to the conclusion that the 1923 Treaty was substantially terminated and by its subsequent limitation to the territorial jurisdiction of the Federal Republic of Germany is not applicable to East Germany.

CONCLUSION

For the reasons above stated the State of Oregon submits that the decision of the Supreme Court of Oregon should be affirmed unless the Court should conclude as contended by the State of Oregon, that the 1923 Treaty was terminated by the execution of the 1954 Treaty. In that event the decision of the Oregon Supreme Court should be modified to the extent that the order of distribution of the real property to the heirs should be reversed and the real property should be included in the escheat to the State of Oregon.

Respectfully submitted.

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APPENDIX**STATUTES, NOTES, AGREEMENTS AND TREATIES INVOLVED**

1. Section 111.070 of the Oregon Revised Statutes provides as follows:

"(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

"(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

"(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

"(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property."

2. The portions of the Constitution of the United States and the Amendments thereto relevant to the present case are as follows:

From Article I, Section 8, headed "Powers of Congress," the clauses providing,

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

From Article I, Section 10, headed "Limitations upon powers of state.", the clauses providing,

"No State shall enter into any Treaty, Alliance, or Confederation; * * *"

"No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign Power, * * *"

From the Fourteenth Amendment, Section 1, headed "Citizenship, privileges and immunities; due process; equal protection.", the clause providing,

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(The excerpts of the Constitution of the United States and Amendments are set forth as published in Vol. 5, Oregon Revised Statutes, pp. 1139-1140, 1141, 1145-1146.)

3. Articles IV and XXXI of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923, proclaimed October 14, 1925, 44 Stat. 2132, 2157, T.S. No. 725, provide as follows:

ARTICLE IV

"Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

ARTICLE XXXI

"The present treaty shall remain in full force for the term of ten years from the date of the exchange of ratifications, on which date it shall begin to take effect in all of its provisions.

"If within one year before the expiration of the aforesaid period of ten years neither High Contracting Party notifies to the other an intention of modifying, by change or omission, any of the provisions of any of the articles in this Treaty or of terminating it upon the expiration of the aforesaid period, the Treaty shall remain in full force and effect after the aforesaid period and until one year from such a time as either of the High Contracting Parties shall have notified to the other an intention of modifying or terminating the Treaty."

4. Notes dated June 2, 1953 between Secretary of State of the United States and the Charge d' Affaires of the Federal Republic of Germany effecting an agreement between United States of America and the Federal Republic of Germany modifying the Treaty of December 8, 1923, as amended, 5 U.S.T. & O.I.A. 827, 828, 829, T.I.A.S. No. 29732, provide as follows:

"The Secretary of State to the Charge d'Affaires of
the Federal Republic of Germany

June 2 1953

Sir:

"I refer to various discussions which have taken place concerning the liability of German nationals to compulsory service in the armed forces of the United States, and to the problem presented to this Government in carrying out the provisions of Article VI of the Treaty of Friendship, Commerce and Consular Rights signed at Washington on December 8, 1923,

in the light of the Universal Military Training and Service Act of 1951. [2] The Act provides that aliens admitted to the United States for permanent residence shall be subject to induction on the same terms as United States citizens.

"In view of this situation, I wish to inform you of the desire of this Government to modify the said Treaty as provided in Article XXXI thereof, by omitting the said Article VI, and I herewith request you to notify your Government that, beginning one year from the date of this note, the Government of the United States will consider the said Article VI to be no longer an operative part of the said Treaty of 1923.

"Accept, Sir, the renewed assurances of my high consideration."

"The Charge d'Affaires of the Federal Republic of Germany to the Secretary of State

June 2, 1953

"Excellency:

I have the honor to acknowledge the receipt of your Excellency's note, dated June 2, 1953, by which the American Government serves notice of its desire to modify the Treaty of Friendship, Commerce, and Consular Rights signed at Washington, December 8, 1923, by omitting Article VI of the Treaty in accordance with the provisions contained in Article XXXI thereof.

Accept, Excellency, the renewed assurances of my highest consideration."

5. The preamble and Articles IV and V of the Agreement concerning the Treaty between the United States of America and Germany of Friendship, Commerce and

Consular Rights of December 8, 1923, as amended, signed June 3, 1953, effective October 22, 1954, 5 U.S.T. & O.I.A. 1939, 1941, 1943, 1944, TIAS No. 3593, provide as follows:

"The United States of America and the Federal Republic of Germany, desirous of strengthening the bonds of friendship existing between them and of placing their relations on a normal and stable basis as soon as possible, have resolved as a step toward that end to restore to full force and effect, except as otherwise provided in the following Articles, the provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany signed at Washington December 8, 1923, as amended, as a provisional measure pending the conclusion of a more comprehensive, modern treaty or treaties for such purposes, and have, through their duly authorized representatives, agreed as follows:"

ARTICLE IV

"Pending the peaceful reunification of Germany, the German territory to which the aforesaid Treaty shall be applied and considered fully operative shall be understood to comprise all areas of land, water and air over which the Federal Republic of Germany exercises jurisdiction. The present agreement shall also enter into force, and the aforesaid Treaty shall be applied and considered fully operative, in the area of Berlin (West) when the Government of the Federal Republic of Germany furnishes the Government of the United States of America a notification that all legal procedures in Berlin necessary therefor have been complied with."

ARTICLE V

"It is agreed that negotiations for a new Treaty of Friendship, Commerce and Navigation shall be entered into without delay."

6. Articles XXVI and XXVIII of the Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, signed October 29, 1954, effective July 14, 1956, 7 U.S.T. & O.I.A. 1839, 1868, TIAS No. 3593, provide as follows:

ARTICLE XXVI

"1. The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each Party, other than the Panama Canal Zone and the Trust Territory of the Pacific Islands.

"2. The present Treaty shall also apply from the date specified in Article XXIX, paragraph 2, to Land Berlin which for the purposes of the present Treaty comprises those areas over which the Berlin Senate exercises jurisdiction.

"3. It is a condition to the application of the present Treaty to Land Berlin, in accordance with the preceding paragraph, that the Government of the Federal Republic of Germany shall previously have furnished to the Government of the United States of America a notification that all legal procedures in Berlin necessary for the application of the present Treaty therein have been complied with.

ARTICLE XXVIII

"The present Treaty shall replace and terminate provisions in force in Articles I through V, VII through XVI, and XXIX through XXXII, of the treaty of friendship, commerce and consular rights between the United States of America and Germany, signed at Washington December 8, 1923, as amended by an exchange of notes dated March 19 and May 21, 1925 and the agreement signed at Washington June 3, 1935, and as applied by the agreement of June 3, 1953, Article VI having terminated on June 2, 1954: Articles XVII through XXVIII of the said treaty, as

amended by Article II of the agreement of June 3, 1953, shall continue in force between the United States of America and the Federal Republic of Germany, with territorial application to the same extent as that provided in Article XXVI of the present Treaty, until replaced by a consular convention between the two Parties or until six months after either Party shall have given to the other Party a written notice of termination of the said Articles."